

DOCUMENT RESUME

ED 212 077

EA 014 353

AUTHOR Seeley, Kenneth R.; Schrant, Nancy E.
TITLE Resolving Disputes in Education.
PUB DATE 79
NOTE 25p.

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Conflict Resolution; Court Litigation; *Due Process;
Elementary Secondary Education; *School Law; Student
Rights
IDENTIFIERS *Adversary Method; Goss v Lopez; Property Rights

ABSTRACT

Because of the increasing incidence of disputes in schools, educators need more knowledge about methods of dispute resolution. The adversary system of resolving disputes, on which the U.S. judicial system is founded, assumes that truth is best found through a struggle between two opposing parties. In the adversary system, due process plays a special role in guaranteeing fairness. Due process can be procedural--defined as the requisite characteristics of proceedings that can deprive a person of life, liberty, or property--or it can be substantive, involving constitutional protection against arbitrary governmental actions. Procedural due process has kindled continuing legal discussion over the definition of rights, privileges, property, liberty, and the particular actions that constitute due process. In education the application of procedural due process has developed through several landmark judicial decisions, such as Goss v. Lopez, which have held that children have a "property" right to education and that they need due process to prevent deprivation of liberty. Other dispute resolution mechanisms besides the adversary system can involve unilateral, one-person actions (such as inaction or avoidance), dyadic methods (negotiation), or third-party intervention (through conciliation, mediation, arbitration, factfinding, or pretrial conferences). (Author/RW)

* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *

ED212077

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

X This document has been reproduced as
received from the person or organization
originating it.

☐ Minor changes have been made to improve
reproduction quality.

• Points of view or opinions stated in this docu-
ment do not necessarily represent official NIE
position or policy.

"PERMISSION TO REPRODUCE THIS
MATERIAL HAS BEEN GRANTED BY

K. R. Seeley

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)."

Resolving Disputes in Education

Kenneth R. Seeley, Ed.D.
University of Denver
School of Education

and

Nancy E. Schrant, J.D., Ph.D.
Colorado Department of Education

EA 014 353

Abstract

Many conflicts arise in the operation of educational systems throughout the United States. Our system of laws and regulations make disputes an increasingly common occurrence in schools. Dispute resolution is a complex process for which educators must prepare themselves. The purpose of this article is fourfold:

1) to provide the reader with a discussion of the concept and nature of the adversary system as one method of dispute resolution; 2) to give the reader an understanding of the concept of due process as it relates to the adversary system, with particular emphasis on procedural due process as distinguished from substantive due process; 3) to give the reader information on the development of procedural due process as it has developed in landmark judicial decisions relating to education; and 4) to provide the reader with a description of major dispute resolution mechanisms which have been utilized as alternatives to or in addition to the traditional judicial method of resolving civil disputes.

Resolving Disputes in Education

Many conflicts arise in the operation of educational systems throughout the United States. Our system of laws and regulations make disputes an increasingly common occurrence in schools. Dispute resolution is a complex process for which educators must prepare themselves. The purpose of this article is fourfold:

1) to provide the reader with a discussion of the concept and nature of the adversary system as one method of dispute resolution; 2) to give the reader an understanding of the concept of due process as it relates to the adversary system, with particular emphasis on procedural due process as distinguished from substantive due process; 3) to give the reader information on the development of procedural due process as it has developed in landmark judicial decisions relating to education; and 4) to provide the reader with a description of major dispute resolution mechanisms which have been utilized as alternatives to or in addition to the traditional judicial method of resolving civil disputes.

Adversary System

The adversary system is grounded in the belief that the search for truth can best be served by a struggle between two diametrically opposed parties while the inquisitorial system uses a disinterested third party acting as a fact-finder to develop the truth. In the adversary system, the responsibility for the development of facts lies with the parties, in contrast to the inquisitorial system where the burden of fact-finding is shifted to the magistrate (Chayes, 1976).

The judge in the adversary system acts as an "umpire" while the magistrate in the inquisitorial system takes a more aggressive role as fact-finder (Neef & Nagel, 1974, pp. 125-126). As an "umpire," the judge in the adversary system takes the passive role of seeing that the rules of argument are observed between the parties.

The difference in the role the judge assumes in the two systems is predicated upon different theories of how the truth can best be found. The adversary system and the inquisitorial system are both merely means of gathering and evaluating information. However, the parties in the adversary system provide information to the passive judge in contrast to the inquisitorial system where the judge actively seeks out and evaluates the information himself (Marvell, 1978).

The rationale buttressing the adversary system, which is consistently put forth is that self-interest motivates the parties to present the facts to the judge which are in their favor. Thus, the truth can best be approached through drawing the judge's attention to facts each party believes to be favorable evidence (Frankel, 1975; Marvell, 1978). The confrontation of the parties and witnesses in a kind of limited warfare is thought to maximize the possibility that the judge will be aware of alternative viewpoints and therefore make a "correct" decision more likely (Neef & Nagel, 1974). The concepts of battle, warfare, and conflict are central to the adversary system harkening back to its ancient common law traditions of trial by combat and ordeal. A further rationale for the adversary system is that the parties are thought to believe it to be fair. The contestants get their day in court, from which they are supposed to gain a certain satisfaction (Marvell, 1978).

The dominant method for dispute resolution in the Anglo-American system is the adversary system. The supporters of the adversary system are legion, and there are strong arguments to support it. The distinguished jurist Felix Frankfurter has summarized the high esteem in which the adversary system is held when he stated:

No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss, notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done. (Joint Anti-Fascist Refugee Comm. v. McGrath, 172-173, 1951).

The adversary system, despite the praise which it has received, is not without its critics. The adversary system has been challenged on the ground that reliance must be placed in the first instance on the aggrieved party to demand a hearing in order for the adversary process to be instigated. This is particularly true in situations involving claims for welfare and other social benefits (Mashaw, 1974).

Another criticism raised goes to the very heart of the adversary system, that being its combative nature. It is believed that the confrontation inherent in the adversary system can have a detrimental effect on society by forcing the parties into rigid opposed positions with the effect of further polarizing members of society (Rubenstein, 1976).

In the area of domestic relations the adversary system has come under severe attack. The psychological impact of the conflict encountered in the courts is believed to undermine the family relations, and further traumatize the participants who are already undergoing emotional problems (Pearson, 1979).

The very formalities of the procedures that have developed in the adversary system, supposedly to safeguard the correctness and fairness, have been accused as being twisted to promote delay, and obstruct truth-finding (Mashaw, 1974). The formalities of the procedures can also be costly in simple terms of monetary price.

Another problem ascribed to the adversary system is that if a fair decision is to be reached, then there must be some parity between the parties so that the decision maker is presented with an equally well presented case of each side. In fact the resources of each side are rarely equal (James, 1965).

Due Process and the Adversary System

The Supreme Court of the United States, as the final interpreter of the constitution, has consistently demonstrated its belief that the adversary process is the best system to guarantee individual rights (Nowak, Rotunda, & Young, 1978).

In the constrained battlefield of the adversary system, it is thought that there must be some limits on the warfare to insure a fair decision and the concept of due process provides, in part, these restraints. The essential guarantee of the due process clause is that of fairness (Joint Anti-Fascist Refugee Comm. v. McGrath, 1951).

One of the fundamental concepts of the adversary system is due process. The concept of due process is based on the belief that where the power of government, in the judicial setting, is used against a person to deprive that person of life, liberty or property, then that person is entitled to a "fair procedure" (Nowak et al., 1978, p. 477).

In the United States, the concept of due process has been made the law of the land by both the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth and Fourteenth Amendments both prohibit governmental actions which would deprive "any person of life, liberty or property without due process of law."¹ In England, the Magna Carta's "according to the law of the land" which put restrictions on English monarchs, is the precursor of the due process of law used in the United States (Ratner, 1968, p. 1049).

The denial of procedures such as notice of adverse factual and legal claims, the opportunity to confront and cross-examine adverse witnesses or parties, the opportunity to produce testimony, to argue one's case before a neutral decision maker, and to an impartial decision based upon all the relevant evidence produced are considered to violate due process (Nowak et al., 1978). These procedures, the denial of which violates due process, are all incorporated in the adversary system. The close connection between due process and the adversary system can be seen.

¹"(N) or shall any person . . . be deprived of life, liberty, or property without due process of law," U.S. Const. Amend. V.

"(N) or shall any State deprive any person of life, liberty, or property without due process of law," U.S. Const. Amend. XIV.

The phrase "due process of law" is obviously a broad and vague term and in a Constitution filled with ambiguous statements, due process is one of the most ambiguous (Ratner, 1968). The ambiguity of the term has brought on a wealth of judicial interpretations, for although it is ambiguous, due process is highly significant (Ratner, 1968).

A dichotomy has been drawn between what is known as substantive due process and procedural due process (Schwartz, 1972). Substantive due process, in general, deals with certain fundamental rights and individual freedoms which are protected under the Constitution against governmental actions which are arbitrary. An exact definition is not possible, but substantive due process may be thought of as the constitutional guaranty against arbitrary deprivation of life, liberty or property (16 Am. Jur. 2d, Const. Law, Sec. 816). Legislation which deprives a citizen of life, liberty or property must be reasonable and it must be reasonably applied (Annotation, 1953, p. 852).

The actual substance of the governmental action (i.e. piece of legislation) is at issue under substantive due process. For example, the due process clause of the Fourteenth Amendment which refers to the states, has been used to incorporate certain guarantees in the Bill of Rights which refers to the Federal Government, and thereby makes certain of the guarantees in the Bill of Rights applicable to the states. Thus, the states are prohibited from passing legislation which would deny freedom of religion, for example, because the state would then violate due process because the freedom of religion guaranteed by the First Amendment has been incorporated into the due process clause of the Fourteenth Amendment (Nowak et al., 1978).

Due process has been treated by the courts as having two aspects, those being substantive and procedural. Procedural due process can be defined as the requisite

characteristics of proceedings which can deprive a person of life, liberty or property (16 Am. Jur. 2d, Const. Law, Sec. 813). Procedural due process requires that a person who may be deprived of a right must be given notice of such possibility, he must be given a hearing and the hearing must be conducted in a fair manner (16 Am. Jur. 2d, Const. Law, Sec. 813). Procedural due process assures each citizen that a certain process must be followed if that citizen is to be deprived of life, liberty or property. For one to be afforded due process, there must be a threat of deprivation of life, liberty or property. In addition, the power of government must be involved in this threat to life, liberty, or property.

Therefore, it is not every action of government to which due process applies but only those actions which affect life, liberty, or property. In attempting to deal with the meaning of life, liberty and property, the courts have developed what has come to be known as the right-privilege distinction. Simply put, the right-privilege doctrine provides that government could deny a citizen a "privilege" without the constitutional restriction of due process.

The right-privilege distinction was criticized (Van Alstyne, 1977). The first attack on the right-privilege distinction came through the development of the concept of "unconstitutional conditions" under which it was held that a state may not do indirectly what it is forbidden from doing directly (Nowak et al., 1978, p. 478). For example, the government may not create a job program and provide that only Catholics are eligible for the program because this would violate the first amendment of freedom of religion. Since the government may not directly abridge the right of freedom of religion, it may not do so indirectly through the guise of a job program. There were numerous other attacks on the right-privilege distinction and it seemed as if the doctrine had been eroded away into oblivion until rather recent Supreme Court decisions. Although abandoning the right-privilege terminology, the court has drawn a distinction between life, recognized liberty

interests and property entitlements on the one hand and unprotected interests sometimes referred to as "mere expectations" on the other hand (Nowak et al., 1978, p. 480).

An example of the court's use of entitlements as opposed to mere unprotected interests can be seen in the case of Goss v. Lopez (1975). In that case, the Supreme Court found that a child's entitlement to a free public education was a property interest within the meaning of the fourteenth amendment. In this instance, the child's property interest or entitlement to an education arises out of a state constitution or state statute granting that right to an education. The court, citing Board of Regents v. Roth (1972), stated: "Protected interests in property are normally 'not created by the (U.S.) Constitution. Rather, they are created and their dimensions are defined 'by an independent source such as state statutes or rules entitling the citizen to certain benefits" (Goss v. Lopez, 1975, pp. 572-573).

One of the key elements in this area is to define what is "property". This is no easy task and of course a precise definition is probably not possible. Certainly real and personal property fall under the definition of "property" but there are other "property" interests which are more difficult to precisely characterize. For example, to the landed gentry of the seventeenth century it would seem strange indeed to argue that a poverty stricken person could have a "property" interest in welfare payments; however, the Supreme Court has held so (Goldberg v. Kelley, 1970). In general, a person may not have a right to government benefits, but when the government grants these benefits it may not then deprive a person of the benefits without conforming to certain procedural safeguards (Nowak et al., 1978).

The Supreme Court case of Goss v. Lopez (1975) also provides an example of the concept of "liberty" under the due process clause. The concept of liberty is by no means limited to the concept of incarceration but rather is extended to in-

clude the idea that "where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him," the minimal requirements of the clause must be satisfied" (Goss v. Lopez, 1975, p. 574, citing Wisconsin v. Constantineau, 1971, p. 437).

If the first hurdle, of establishing that there is a constitutionally protected right involved, has been successfully negotiated then it is at this point that a determination must be made as to what "process" is "due". There has, of course, been some difficulty in defining exactly the nature of the process which is constitutionally acceptable. The Supreme Court, in discussing this problem, has said:

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . whether the Constitution requires that a particular right obtained in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, are all considerations which must be taken into account. (Hannah v. Larche, 1969, p. 442).

Faced with this admittedly ambiguous situation the court has taken the practical approach of applying a balancing process to individual fact situations. Under this concept the Court determines the nature of each proceeding and the procedure to be used by weighing the value of the procedure to the person involved against the cost of the procedure to society. The court in the recent case of Mathews v. Eldridge (1976) has articulated a three-pronged test to be used in this balancing process:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural prerequisites would entail. (p. 355).

The courts, by utilizing this balancing test, have articulated some elements which are essential as part of the due process afforded individuals. It should

be remembered that each individual case must be examined to determine which elements of the adversary process are required.

The concept of due process is not limited to formal trials in a strict judicial setting. Due process extends to administrative proceedings. This is clearly necessary, for in modern government the simple tripartite form of government, legislative, judicial, and executive, is thought to be inadequate to deal with current problems (Franklin, 1968). Agencies of government now have powers which embrace all three of the branches of government. Thus agencies are entrusted by the legislature with rule-making, enforcement, and adjudicative powers.

The Supreme Court has used the balancing test in the administrative hearing. The court in Goldberg v. Kelly (1970) dealt with the problem of termination of welfare benefits. The court, in likening the interest in welfare benefits to a property right, found that a "quasi-judicial trial" was not required by due process but the court further held that a pre-termination hearing was required by due process to be afforded the welfare recipient. In truth, the court required such extensive procedures at the pre-termination hearing that if one were of a jaundice view, it could be said that the pre-termination hearing was in fact a "quasi-judicial trial" (Nowak et al., 1978). Those requirements the court found necessary include: 1) prior notice; 2) opportunity for oral argument; 3) right to present evidence; 4) right to confront and cross-examine witnesses; 5) right to disclosure of evidence; 6) the right to have an attorney present the case; 7) the right to a decision based solely on the record; 8) right to an impartial decision-maker; and 9) the right to have the reasons for the determination stated (Nowak et al., 1978, p. 499).

One can contrast the substantial procedures required in Goldberg, to the minimal procedures the Court found required by due process in the case of Goss v. Lopez (1975). Goss v. Lopez involved the case of school students who were sus-

pended from school. The court held that due process would be satisfied by "at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension" (1975, p. 584).

Due Process in Education

The Fourteenth Amendment's requirement of due process has been found to be applicable to the field of education under two broad theories. One theory views education as a property entitlement. Once education is established as a property entitlement, it is an easy step for the courts to find that the denial or interference with education requires procedures under the Due Process Clause.

The courts apparently take the position that there is no Federal constitutional obligation on the states to create a school system; however, property interests can be created by sources other than the constitution. Board of Regents v. Roth (1972) held that a property interest may be created by a state statute which "entitles" the citizen to particular benefits. The court has focused upon this notion of "entitlement" in its definition of property. An interest will be considered to be property and thus afforded due process protection if a person is "entitled" to it (Nowak et al., 1978). The source of law which creates the entitlement must define the interest such that under the law the citizen should continue to receive the benefit of it (Nowak et al., 1978, p. 491).

The court in Goss v. Lopez (1975) cited Brown v. Board of Education (1954) in its rejection of appellant's argument that even if the right to education is generally to be given the benefit of due process protection, that the protection is evoked only when there is a "severe detriment or grievous loss" (p. 575) at issue. The court in Goss cited the often-quoted statement: "Education is perhaps the most important function of state and local governments" (Brown vs. Board of Education, 1954, p. 493).

Although there is apparently no constitutional obligation for the states to

create a school system, once the school system has been created then the children who are required to attend that school do not "shed their constitutional rights" at the schoolhouse door (Tinker v. Des Moines Independent Community School District, 1969, p. 506). "A state may not impone and enforce unconstitutional conditions upon attendance at public institutions of learning" (68 Am. Jur. 2d, Schools, Sec. 242). Earlier in the case of West Virginia Board of Education v. Barnette (1943), the court, in affording student's symbolic speech (i.e., flag salute) First Amendment protection stated "The Fourteenth Amendment as now applied to the States, protects the citizen against the State itself and all of its creatures, Boards of Education not excepted" (p. 637).

The culmination of this theory is found in the case of Goss v. Lopez (1975) which has been discussed earlier. The court in that case found that a child has a property interest in education which falls within the meaning of the fourteenth amendment.

The second theory takes the position that children require the protection of the Fourteenth Amendment's due process safeguards against the deprivation of liberty interests. The landmark case in this area is Wisconsin v. Constantineau (1971). Constantineau is not itself a case dealing with education. The plaintiff in that case challenged the right of the state, through its police, to post a notice in retail liquor establishments forbidding sales to the plaintiff because of her drinking habits. The police posted such notices without notice to the plaintiff or without prior hearing. The court held that due process required notice and an opportunity to be heard prior to the posting of a notice concerning her drinking habits. The court in Goss (1975) cited Constantineau as authority for its reasoning that suspension procedures must meet the requirements of due process because a student's suspension could seriously damage the student's standing with other students and teachers, and could interfere with later employment

opportunities (p. 575).

The courts have recognized judicial restraint as being necessary when there is judicial interposition in the operations of the public schools (Epperson v. Arkansas, 1968). In holding that high school students were entitled to notice of the charges against them and an opportunity to explain their story, the court in Goss noted that "to impose. . . even truncated trial-type procedures might well overwhelm administrative facilities in many places, and by diverting resources, cost more than it would save in educational effectiveness" (p. 583). The court went on to indicate that an intensification of the adversary nature of suspension may "destroy its effectiveness as part of the teaching process" (p. 583).

There is a continuing emphasis on the necessity for flexibility in the application of due process procedures. For example, the Supreme Court (Ingraham v. Wright, 1977), although recognizing physical punishment of a student as constituting the deprivation of a liberty interest, held that a state law which limited the state in its authority to inflict corporal punishment, and the availability to the student of a subsequent tort action would enable the student to protect his interests.

In a recent opinion the United States Supreme Court in Board of Curators v. Horowitz (1978) held that a medical school student who had been dismissed because of low marks in her clinical work, without benefit of a formal hearing had not been denied procedural due process safeguards. The court made no determination as to whether or not a property or liberty interest was at issue because the student, although not granted a hearing, was afforded a fair procedure. Notice to the student and a fair procedure for review of her record was held to be sufficient. The court emphasized that the school had adhered to all previously established procedures. Mr. Justice Rehnquist, writing the majority opinion, asserted that even assuming the existence of a liberty or property interest, the case could

be distinguished from Goss v. Lopez in that Goss involved a disciplinary procedure in which it was necessary to allow the student the opportunity to explain his or her version of the incident. Utilizing the balancing test of Mathews v. Eldridge, the decreased likelihood of a wrongful dismissal results in fewer procedural safeguards being necessary (Nowak et al., 1978).

Alternative Dispute Resolution Mechanisms

There are many methods of dispute resolution which are used as alternatives to or in addition to the judicial method. A study sponsored by the National Institute of Law Enforcement and Criminal Justice (McGillis & Mullen, 1977) presented an overview of dispute processing mechanisms utilized in the United States. This section will discuss each method of dispute resolution indicating their essential characteristics.

Unilateral Actions by Disputants

When disputes arise between parties they can at times be settled by the action of just one of the parties. In its simplest form, this can be accomplished by one party doing absolutely nothing about the dispute. An example of this would be an angered customer of the telephone company deciding that their dispute with the company is not worth the trouble of doing anything about it. This method of inaction has been referred to as "lumping it" (Felstiner, 1974, p. 81). Another technique which one of the parties may employ is avoidance. This is similar to inaction because the disputant does not take measures to resolve the dispute. Rather, the disputant attempts to avoid future disputes with the opposing party by withdrawing from any contact with the other party (McGillis & Mullen, 1977). Self-help tactics would include methods such as appealing to other agencies in order to gain assistance with the problem.

The use of one unilateral technique, inaction, customarily occurs when one party is dependent on the other and cannot risk an open dispute. This often occurs when there is a significant discrepancy between the power of the dispu-

tants and when there is little motivation for the disputant with more power to settle the dispute. The use of another unilateral technique, avoidance, presupposes that the withdrawing party is not dependent on the other party and can find an adequate substitute for the relationship (Felstiner, 1974). Danzig and Lowy (1975) emphasize the negative effects of avoidance dispute resolution including grievous psychological effects and legitimate grievances which can be unresolved, thereby increasing the likelihood that others will suffer the same wrong done to them.

Dyadic Methods Between Disputants

Included in this category is the method of negotiation which involves the direct contact between the disputants without the intervention of a third party. In essence, negotiation is a conference between the two contending parties upon the terms of a proposed agreement (Black's Law Dictionary, 4th ed.). In negotiation there is direct bilateral discussion of the issues between the parties. The purpose of the negotiation is to arrive at a mutually agreeable settlement which is customarily done through compromises (McGillis & Mullen, 1977). Negotiation is a particularly effective device when used between parties that have a long-standing and ongoing relationship such as husband and wife. Negotiation is thought to be appropriate and useful in these interdependent relationships because each party has sanctions that can be imposed on the other, thus making compromise likely in these situations (Galanter, 1974).

In contrast to adjudication, in negotiation there is a capacity for accommodation between the parties. The agreement reached between the parties can be based upon a common agreement on the factual basis for each agreement giving varying weight to factual perceptions of the parties. In contrast, adjudication must finally determine one set of factors to be correct and thus label one disputant right and the other wrong (Eisenberg, 1976).

Third Party Intervention Methods

The primary distinguishing characteristic within this category of mechanisms is the use of a third party who intervenes to facilitate dispute settlement. Included within this category are conciliation, mediation, arbitration, fact-finding, and pretrial conference.

In its strict sense, conciliation means the very limited involvement of a third party to help encourage contending parties to discuss their differences (International Labour Office, 1973). The conciliator is merely attempting to encourage negotiation which has been shown not to involve a third party. Conciliation may be distinguished from mediation in that mediation involves the active participation of the third party and connotes a stronger form of intervention than is involved in conciliation (International Labour Office, 1973).

Mediation simply means intervention. It is an act by a third party who interferes and interposes between two contending parties with the intent to reconcile or settle the dispute between the contending parties (Words and Phrases).

In practice, mediation is conducted in a variety of ways. The involvement of the third party can range anywhere from fairly minor involvement of unstructured simple advice to the contending parties, to a highly developed structured setting wherein the mediator himself formulates a plan to resolve the dispute (McGillis & Mullen, 1977).

A mediator, unlike a judge in the court system, does not have the power of coercion to force the parties to a resolution desired by the mediator. The mediator must instead rely on persuasion and the consent of the parties to reach resolution (McGillis & Mullen, 1977). Judges may order, but mediators must persuade (Fuller, 1971). An agreement between the disputants is a principal goal of mediation (Kochan & Jick, 1978).

There is, in general, no formal structure which exists to direct the resolution of the dispute. The mediator, rather, develops the structure as the mediation process develops (Fuller, 1971).

The mediator, again unlike a judge, does not resolve the differences between the parties by imposing rules on the parties. The mediator instead attempts to reorganize the relationship of the parties and shift the perception of the parties from that of adversaries to one of mutual assistance. If a relationship of mutual assistance between the former contending parties arises, then the relationship will not depend upon the existence of a structured system to regulate interactions of the parties. Rather the parties, having achieved an enlightened awareness of their relationships, can interact informally with one another in a harmonious manner based on the understanding and faith in their relationship. This at least is what mediation is directed towards achieving (Fuller, 1971).

Compromise is the basis of mediation. In the strict sense, adjudication does not recognize compromise, one side is right and the other is wrong (Smith, 1978). The loser is, understandably, not enamored with the process which arrived at the decision that he loses. The loser is faced with the choice of either agreeing with the adjudication that his actions in the past are wrong or he can take the position that the court, which found him in error, is wrong. It is against human experience to believe that many judicial losers will elect to take the former option. That being the case, it can be expected that half the participants in an adjudication will become alienated from the adjudicative process (*Felstiner, 1974).

Through the process of mediation the parties reach a resolution on their own unlike adjudication where the judge decides the issues for the parties. The process of mediation places the parties in a forum where they can, through an examination of the issues, find areas of compromise. The parties in the mediation

must be resolved to make their own decision (Danzig & Lowy, 1975).

In examining what areas might be the most fruitful for the use of mediation it has been suggested that mediation be limited to the situation where only two parties are involved and where the parties have enough common interest to insure their collaboration in the effort towards mediation (Fuller, 1971).

In arbitration, the contending parties by advanced agreement refer a dispute to an impartial third party for resolution. The parties agree in advance to accept the decision of the arbitrator as final and finding (American Arbitration Association, 1979).

The decision of the arbitrator is customarily backed by sanctions and therefore is binding (McGillis & Mullen, 1977). Arbitration has certain similarities to the judicial proceeding in that an opinion by the arbitrator is made and the opinion is attempted to be rationalized by reference to general principles in the same way a judicial opinion is based upon principles of law (Sander, 1976).

The arbitration proceeding can take on the very formal and structured look of adjudication or it can resemble the relatively informal appearance of negotiation or mediation (Johnson et al., 1977). The parties generally have a choice in the selection of the arbitrator, unlike judicial proceedings.

Arbitration is often the last resort and typically follows mediation attempts (McGillis & Mullen, 1977). The parties can arrive at arbitration because it may be required by statute, or the parties may have agreed in a contractual manner that this is the method of dispute resolution (Sander, 1976).

A third party may be employed to investigate the dispute between two parties and then enter a judgment based on the investigation (McGillis & Mullen, 1977). In contrast to adjudication and arbitration the fact-finder customarily does not have sanctions to enforce his decision. However, the fact-finder, sometimes called an Ombudsman, derives some power from the position and can induce settlement on the parties through the persuasive power of his/her conclusions

(Sander, 1976). The persuasive power of the fact-finder comes from the position as an independent, neutral and sometimes high-level official who is concerned with the rights of both sides (Johnson et al., 1977, p. 58).

The pretrial conference is an instrument that is designed to facilitate an efficient and speedy trial that will result in an equitable outcome (Pollack, 1970). In formal adjudication it is customary to hold a formal conference between the parties with the judge presiding over the proceedings. From such a conference, an order is often issued which controls the subsequent course of action at trial. The participation of the individual judge presiding at the conference is significant to the outcomes of the conference (Pretrial Conference Procedures, 1974).

Primary purposes of the conference include limiting and narrowing issues for trial to those which may not be disposed of by admissions or agreements of counsel; limitation of number of witnesses and elimination of surprise at trial (Pretrial Conference Procedures, 1974). The above are avowed purposes of the conference; however, it is anticipated that settlement will often result from this conference (Johnson, 1979). The use of the conference can often eliminate part of the dispute between the parties by admission or agreement, if the entire dispute cannot be settled. In a similar manner, a pre-hearing conference can be used in administrative proceedings, such as a due process hearing.

Summary and Conclusions

The courts, whom one would suppose to be the standard bearers of the adversary system, have come themselves to openly criticize the adversary system in the school setting. Justice Powell, in Goss v. Lopez (1975) has taken a strong stand on the appropriateness of the adversary model in the school setting. In his opinion, which has reached remarkable publicity for a dissenting opinion, he has

said: "One of the most disturbing aspects of today's decision is its indiscriminate reliance upon the adversary process as a means of resolving many of the most routine problems arising in the classroom" (1975, p. 594).

The esteem in which alternative dispute resolution procedures have been held has taken an upturn in recent years in the United States. The reason attributed to the cause of this rise in esteem are legion but include the perceived overburdened judicial system. The alternatives which are most commonly advanced are negotiation, conciliation, arbitration, and mediation (Ford Foundation, 1978; Nader & Singer, 1976). Application of these concepts to education are essential as alternatives to judicial processes and serve as more effective and humane approaches in a social system designed to educate children.

BIBLIOGRAPHY

American Jurisprudence and American Jurisprudence 2d. San Francisco: Bancroft, Whitney, and New York: The Lawyers Cooperative Publishing.

Annotation: Suspension or revocation of medical or legal professional license as violating due process federal cases, 98 L. Ed. 851 (1953).

Board of Curators v. Horowitz, 435 U.S. 78, 98 S.Ct. 948 (1978).

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

Black, H.C. Black's law dictionary (4th ed.). St. Paul: West Publishing, 1951.

Eisenberg, M.A. Private ordering through negotiation: Dispute-settlement and rulemaking. Harvard Law Review, 1976, 89 637-681.

Danzig, R. & Lowy, M. J. Everyday disputes and mediation in the United States: A reply to Professor Felstiner. Law and Society Review, 1975, 9, 675-694.

Ipperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed 2d 228 (1968).

Felstiner, W.L. Influences of social organization dispute-processing. Law and Society Review, 1974, 9, 63-96.

Ford Foundation. New approaches to conflict resolution. New York: Author, 1978.

Frankel, M.E. The search for truth: An umpireal view. University of Pennsylvania Law Review, 1975, 123 1031-1059.

Franklin, M.A. The dynamics of American law: Courts, the legal process and freedom of expression. Mineola: The Foundation Press, 1968.

Fuller, L.L. Mediation—its forms and functions. Southern California Law Review, 1975, 123, 1031-1059.

Gallanter, M. Why the "haves" come out ahead: Speculations on the limits of legal change. Law and Society Review, 1974, 8, 95-160.

Goldberg v. Kelley, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287, 1970.

Goss v. Lopez, 419 U.S. 565, 95 S. Ct., 42 L. Ed. 2d 725 (1975).

Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

International Labour Office, Conciliation in industrial disputes.
Geneva: Author, 1973.

James, F., Jr. Civil procedure. Boston: Little, Brown, 1965.

Johnson, E., Jr., Kantor, V., & Schwartz, E. Outside the courts: A survey of diversion alternatives in civil cases. Denver: National Center for State Courts, 1977.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951).

Kochan, T. & Jick, T. The public sector mediation process: A theory and empirical examination. Journal of Conflict Resolution, 1978, 22, 209-239.

Marvell, T. Appellate courts and lawyers: Information gathering in the adversary system. Westport: Greenwood Press, 1978.

Mashaw, J.L. The management side of due process: Some theoretical and litigation notes on the assurance of accuracy, fairness, and timeliness in the adjudication of social welfare claims. Cornell Law Review, 1974, 59, 772-824.

Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

McGillis, D. & Mullen, J. Neighborhood justice centers: An Analysis of potential models. Cambridge: ABT associates, 1977. (ERIC No. ED150528).

Nader, L. and Singer, L.R. Dispute resolution. California State Bar Journal, 1976, 51, 281-286, 311-320.

Neef, M. & Nagel, S. The adversary nature of the American legal system from a historical perspective. New York Law Forum, 1974, 20, 123-164.

Nowak, J.E., Rotunda, R.D. & Younger, N.J. Handbook on constitutional law. St. Paul: West Publishing, 1978. Cumulative supplements to date.

Pearson, J. The Denver custody mediation project. Colorado Lawyer, 1979, 8, 1211-1220.

Pretrial conference procedures, South Carolina Law Review, 1974, 26, 481-515.

Ratner, L.G. The function of the due process clause. University of Pennsylvania Law Review, 1968, 116, 1048-1117.

Rubenstein, L.S. Procedural due process and the limits of the adversary system. Harvard Civil Rights--Civil Liberties Law Review, 1976, 11, 48-96.

Sander, F.E. Varieties of dispute processing. Address at the national conference on the causes of popular dissatisfaction with the administration of justice (Pound Conference). Federal Rules Decisions, 1976, 70, 111-134.

Schwartz, B. Constitutional law: A Textbook, New York: Macmillan, 1972.

Smith, D.N. A warmer way of disputing: Mediation and conciliation, American Journal of Comparative Law, 1978, 26, 205-216.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

West Virginia Board of Ed.v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943).

Wisconsin v. Constantineau, 400 U.S. 433, al S. Ct. 507, 27 L. Ed. 2d 515 (1971).

Words and phrases. St. Paul: West Publishing, updated by pocket parts.